

1 District Judge Richard A. Jones  
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7 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 E.L.A. and O.L.C.,

9 Plaintiffs,

10 v.

11 UNITED STATES OF AMERICA,

12 Defendant.

13 Case No. 2:20-cv-1524-RAJ

14 **MOTION TO RECONSIDER ORDER  
GRANTING IN PART DEFENDANT'S  
MOTION TO TRANSFER AND  
PARTIAL MOTION TO DISMISS**

15 Note on Motion Calendar: June 17, 2022

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MOT. TO RECONSIDER ORDER GRANTING IN  
PART DEF.'S MOT. TO TRANSFER & PARTIAL  
MOT. TO DISMISS

Case No. 2:20-cv-1524-RAJ

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## INTRODUCTION

Plaintiffs E.L.A. and O.L.C. respectfully request that the Court reconsider its June 3, 2022, Order (Dkt. 36) insofar as it dismisses their abuse of process claim. Defendant’s employees abused process under Texas law when they used legal proceedings in E.L.A.’s federal criminal prosecution *after* initiating the case to designate O.L.C. an unaccompanied minor, thus separating E.L.A. and O.L.C. for months. That later use of a legal process was “collateral” to E.L.A.’s criminal proceedings and was *not* required by his federal criminal prosecution. To the contrary, using E.L.A.’s brief appearance in federal court as the basis to designate O.L.C. “unaccompanied” in order to separate him from E.L.A. egregiously violated Plaintiffs’ due process rights. *See, e.g., Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (enjoining Defendant’s family separation policy); *D.J.C.V. v. United States*, No. 20 Civ. 5747 (PAE), 2022 WL 1912254, at \*12–17 (S.D.N.Y. June 3, 2022) (holding in Federal Tort Claims Act case that plaintiffs had adequately alleged that Zero Tolerance policy, which produced family separations, violated procedural and substantive due process).

15 While this Court disfavors motions to reconsider, Plaintiffs respectfully submit that the  
16 Court overlooked paragraphs 37–39 of the complaint, which include key allegations as to the  
17 abuse of process claim and how they relate to the governing case law. The complaint alleges that  
18 Defendant’s employees used the criminal proceedings in E.L.A.’s case to justify his separation  
19 from O.L.C. And while the Court was correct that Texas case law says a proper use of legal  
20 process cannot be an abuse of process, that is not what E.L.A. and O.L.C. alleged. Rather,  
21 Plaintiffs alleged that parts of the legal process that followed were later improperly and  
22 unlawfully used to designate O.L.C. unaccompanied. That designation was “collateral” to  
23 E.L.A.’s criminal prosecution, which is what Texas courts have explained is necessary to allow  
24 an abuse of process claim to proceed. Accordingly, the Court erred as a matter of law in granting

1 the Defendant's motion to dismiss on this claim, and Plaintiffs ask the Court to correct this  
 2 error.<sup>1</sup>

3 **ARGUMENT**

4 **I. Standard of Review**

5 This Court disfavors motions to reconsider. L. Civ. R. 7(h). Such motions are, however,  
 6 appropriate where a party shows a "manifest error of law." *Chung v. Washington Interscholastic*  
 7 *Activities Ass'n*, 550 F. Supp. 3d 920, 924 (W.D. Wash. 2021); *see also* L. Civ. R. 7(h).

8 Defendant's underlying motion to dismiss is governed by Federal Rule of Procedure 12(b)(6). To  
 9 survive a motion to dismiss under Rule 12(b)(6), Plaintiffs need only show that the  
 10 "complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that  
 11 is plausible on its face." *Bain v. California Teachers Ass'n*, 891 F.3d 1206, 1211 (9th Cir. 2018)  
 12 (citation omitted). In conducting that Rule 12(b)(6) inquiry, the Court "presumes that the facts  
 13 alleged by the plaintiff are true . . . [and] draw[s] all reasonable inferences from the complaint  
 14 in [the Plaintiffs'] favor." *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013)  
 15 (citations omitted).

16 **II. Defendant's Employees Abused Process by Using E.L.A.'s Court Appearance to  
 17 Realize the "Collateral" Goal of Designating O.L.C. an Unaccompanied Minor.**

18 As the Court stated in its decision, an abuse of process claim under Texas law contains  
 19 three elements. A plaintiff must allege:

20 (1) that the defendant made an illegal, improper or perverted use of the process, a  
 21 use neither warranted nor authorized by the process; (2) that the defendant had an  
 22 ulterior motive or purpose in exercising such illegal, perverted or improper use of  
 23 the process; and (3) that damage resulted to the plaintiff as a result of such illegal  
 24 act.

25 *Liverman v. Payne-Hall*, 486 S.W.3d 1, 5 (Tex. App. 2015) (citation omitted); *see also* Dkt. 36 at

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24<sup>1</sup> Plaintiffs do not ask the Court to reconsider its decision denying the negligence claim.

1 11. The Court found that Plaintiffs pleaded the second and third elements of this claim, but not  
 2 the first element: “an illegal, improper, or perverted use of the process.” Dkt. 36 at 12 (internal  
 3 quotation marks omitted). The Court explained that this was “because ELA was properly charged  
 4 with illegal entry,” stating that Plaintiffs’ allegations focused only on the “reason for charging  
 5 ELA, not [the] process” that followed. *Id.*

6 The Court is correct that Plaintiffs do not contest E.L.A. was properly charged with  
 7 illegal entry. However, it was error to overlook Plaintiffs’ allegations that Defendant then made  
 8 an illegal, improper, or perverted used of that criminal proceeding. Paragraphs 37–39 of the  
 9 complaint are the central allegations regarding the abuse of process claim, but are not discussed  
 10 or referenced in the Court’s decision. Those paragraphs explicitly allege that Defendant’s  
 11 employees used a legal process in a way *collateral* to the prosecution and *after* the prosecution  
 12 was initiated to bring about Plaintiffs’ separation, even though E.L.A.’s federal prosecution did  
 13 not require that separation. Specifically, Plaintiffs explained that Defendant’s employees used  
 14 E.L.A.’s court hearing, which lasted only a few hours, to designate O.L.C. an unaccompanied  
 15 minor under 6 U.S.C. § 279(b). Dkt. 1 ¶ 38. Defendant did so even though E.L.A. never entered  
 16 the Bureau of Prisons’ custody and received only a sentence of time served. *Id.* ¶ 37. Indeed, he  
 17 was brought from DHS custody to the hearing and immediately returned to DHS custody after  
 18 the hearing. *Id.* These allegations do not concern “the reason for charging ELA,” as the Court  
 19 determined. Dkt. 36 at 12. Instead, these allegations explicitly reference Defendant’s employees’  
 20 corrupt use of the legal process (after that process was initiated) for a “collateral” purpose. Dkt. 1  
 21 ¶¶ 37–39.

22 Plaintiffs’ allegations sufficiently state the first element of an abuse of process claim  
 23 under Texas law. Texas courts have explained that *even if the process itself was lawful*, an abuse  
 24 of process claim is proper where a plaintiff alleges the defendant took “collateral” actions that

1 the process itself did not warrant or authorize. *See, e.g., Rodriguez v. Carroll*, 510 F. Supp. 547,  
 2 553 (S.D. Tex. 1981) (“Overt acts done to obtain a *collateral and unlawful objective* to that  
 3 appearing on the face of the instituted action may amount to abuse of process.” (emphasis  
 4 added)); *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 469 (W.D. Tex. 1999) (“The tort  
 5 compensates a plaintiff when process is used against him *for a collateral purpose*, such as  
 6 obtaining property or the payment of money—something which is not the proper subject of the  
 7 proceeding itself.” (emphasis added)); *Blackstock v. Tatum*, 396 S.W.2d 463, 468 (Tex. Civ.  
 8 App. 1965) (“The improper purpose usually takes the form of coercion to obtain a collateral  
 9 advantage, not properly involved in the proceeding itself. . . .”).

10 For example, in *Duffie v Wichita County*, a Texas federal court allowed an abuse of  
 11 process claim to proceed precisely because the plaintiffs “adequately allege[d] . . . that [the  
 12 defendant] made improper use of process *after* it was issued.” 990 F. Supp. 2d 695, 720 (N.D.  
 13 Tex. 2013). Like here, *Duffie* involved a criminal prosecution. *Id.* The *Duffie* plaintiffs were  
 14 nurses who had filed a complaint with the Texas Board of Nursing against defendant Smith, the  
 15 Wichita County Jail’s Health Services Administrator. *Id.* at 702–04. Smith retaliated in part by  
 16 working with the district attorney, who filed a criminal information against the nurses. *Id.* at 705.  
 17 The nurses were found not guilty. *Id.* Later, in federal court, the plaintiffs alleged that Smith had  
 18 informed the Board of the arrest warrants issued in that criminal case to thwart the Board’s  
 19 investigation of Smith. *Id.* at 720. Those allegations—which, like here, involve using a criminal  
 20 legal process to pursue an improper objective outside of that process—stated an abuse of process  
 21 claim. *Id.* (distinguishing between an improper motive in securing the process, which would not  
 22 state a claim, and improper use of the process after it issued, which did state a claim).

23 Plaintiffs’ similar claims fit comfortably within Texas law. As noted, the complaint  
 24 explicitly alleged that Defendant’s employees made use of legal process after E.L.A.’s

1 prosecution was initiated to obtain some other improper purpose, even if the prosecution itself  
 2 was proper. The designation of O.L.C. as an unaccompanied minor was “collateral” to E.L.A.’s  
 3 prosecution, as nothing about the criminal proceedings required designating O.L.C. an  
 4 unaccompanied minor (indeed, Defendant has never claimed otherwise). And it involves a “use  
 5 of [the] process *after* it was issued,” *Duffie*, 990 F. Supp. 2d at 720, because the claim focuses on  
 6 the legal proceedings following the criminal complaint. *See Dkt. 1 ¶ 38* (“E.L.A.’s court hearing  
 7 for his illegal entry took a matter of hours. However, despite never entering BOP custody and  
 8 having only a single, brief court appearance, CBP and Immigration and Customs Enforcement  
 9 (ICE) used E.L.A.’s federal court proceedings and prison sentence [of time served] to designate  
 10 O.L.C. an “unaccompanied minor.””). “[D]rawing all reasonable inferences from the complaint in  
 11 [Plaintiffs’] favor,” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010)  
 12 (en banc), these allegations sufficiently demonstrate that Plaintiffs have alleged Defendant’s  
 13 employees used legal process after E.L.A.’s prosecution was initiated to achieve a collateral and  
 14 improper purpose that was “not the proper subject of the proceeding itself,” *Andrade*, 65 F.  
 15 Supp. 2d at 469; *see also Rodriguez*, 510 F. Supp. at 553; *Blackstock*, 396 S.W.2d at 468; *Luna*  
 16 *v. United States*, No 20-cv-1152-RSL, 2021 WL 673534, at \*4 (W.D. Wash. Feb. 22, 2021)  
 17 (dismissing abuse of process claim involving Texas law because, unlike here, Plaintiffs had “not  
 18 alleged that [the plaintiff] was served with process of any sort or that defendant *subsequently* and  
 19 improperly used plaintiff’s *compelled appearance* to achieve a purpose not contemplated by the  
 20 process” (emphasis added)).

21 In sum the Court overlooked key allegations in Plaintiffs’ complaint and the law that  
 22 Plaintiffs cited to show how these allegations satisfied the first element of an abuse of process  
 23 complaint. Dkt. 36 at 11–12. That was manifest error, and the Court should therefore grant  
 24 Plaintiffs’ motion for reconsideration and deny Defendant’s motion to dismiss with respect to the

1 abuse of process claim.

2 **CONCLUSION**

3 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion  
4 and amend its order to deny Defendant's partial motion to dismiss as to the abuse of process  
5 claim.

6 DATED this 17th day of June, 2022.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 17th day of June, 2022.

s/ Aaron Korthuis

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